



[6450-01-P]

DEPARTMENT OF ENERGY

10 CFR Part 708

DOE-OHA-2019-0017

RIN 1903-AA09

Revisions to the DOE Contractor Employee Protection Program

AGENCY: Office of Hearings and Appeals, Department of Energy.

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: The DOE Contractor Employee Protection Program extends whistleblower protections similar to those in the Whistleblower Protection Act to employees of DOE contractors and subcontractors. The Office of Hearings and Appeals (OHA) proposes to modernize the Department of Energy's (DOE or Department) contractor employee whistleblower program, as well as provide improvements within the existing program.

DATES: Comments are due by *[INSERT DATE 30 DAYS AFTER OF PUBLICATION IN THE FEDERAL REGISTER]*.

ADDRESSES: Inquiries should be sent to the Office of Hearings and Appeals, U.S. Department of Energy, 1000 Independence Ave., S.W., Washington, DC 20585-0107, (202) 287-1550, Email: kristin.martin@hq.doe.gov. Comments must identify the Notice of Proposed Rulemaking for the DOE Contractor Employee Protection Program. Comments may be submitted using any of the following methods:

1. *Federal eRulemaking Portal:* <http://www.regulations.gov/docket?D=DOE-OHA-2019-0017>.

Follow the instructions for submitting comments.

2. *Email:* Kristin.Martin@hq.doe.gov.

FOR FURTHER INFORMATION CONTACT: Kristin L. Martin, Attorney-Advisor, Office of Hearings and Appeals, U.S. Department of Energy, 1000 Independence Ave., S.W., Washington, DC 20585-0107, (202) 287-1550, Email: *kristin.martin@hq.doe.gov*.

SUPPLEMENTARY INFORMATION:

I. Regulatory History

While most DOE facilities are run by contractors, and DOE contractor employees far outnumber DOE employees, the Whistleblower Protection Act only protects federal employees. Therefore, in order to ensure safe, well-managed workplaces at its facilities, DOE enacted a whistleblower protection program for contractor employees in 1992, the DOE Contractor Employee Protection Program, now codified at 10 CFR part 708. 57 FR 7533 (March 3, 1992). The program underwent a previous revision in 1999.

II. Summary of Proposed Revisions

The OHA proposes the following revisions. All section numbers reference the section numbers in the revised regulation.

A. Headings

The OHA proposes to update Part 708's section headings for clarity, so that readers will be able to more quickly pinpoint the location of the information they seek. The updated headings may also offer guidance when the scope, purpose, or meaning of a section's content is unclear.

B. § 708.2 Definitions

1. The OHA proposes moving the definition of “Administrative Judge” so that the definitions are in alphabetical order. The OHA also proposes updating this definition to reflect the role Administrative Judges will play in Part 708 proceedings under the revised rule.

2. The OHA proposes adding a definition of “Alternative Dispute Resolution”. OHA believes that this definition better highlights the flexibility and scope of DOE’s conflict management and resolution resources.

3. The OHA proposes discontinuing the use of the word “you” in Part 708 to describe employees of contractors. Regulated parties include contractors as well as employees and the use of “you” makes it difficult to distinguish between them. Accordingly, third person titles and pronouns are used throughout the part and the definition of “you” has been removed.

4. For clarity and inclusivity, the OHA proposes to add a clause stating that the use of the singular includes the plural and that the male pronoun is gender neutral. Such a clause reduces ambiguity and allows for more concise language in the regulation.

5. The OHA proposes to add a definition of “complainant.”

C. § 708.8 Application to pending cases

The OHA proposes that revisions to Part 708 will apply to cases filed on or after the effective date of the finalized revisions.

D. § 708.9 How to file complaints or other documents

1. Currently, the word “filed” is defined separately from the filing instructions, which are contained in a subpart with a specific, limited scope. The OHA proposes to combine these sections in the introductory subpart. This will clarify that the definition and instructions apply generally throughout Part 708.

2. The OHA proposes to mandate that all documents filed with the OHA be filed electronically, except when permission is granted to file in another manner. Electronic filing is faster, more reliable, and more cost-efficient than paper filing. It also coordinates with DOE electronic records retention policy. However, not everyone can file electronically and some materials are better mailed or faxed for logistical reasons. Accordingly, any person wishing to file via non-electronic means may contact the OHA—whether by phone, email, U.S. Mail, or another service—and request permission. The OHA will consider granting such requests in circumstances where good cause has been shown why the document cannot or should not be filed electronically. This section does not affect parties’ ability to file documents by any other method with any other DOE element.

3. The OHA proposes to specify that a complaint may be withdrawn by the complainant at any time. This codifies the OHA’s longstanding practice.

E. § 708.10 Informal resolution of complaints

Currently, references to Alternative Dispute Resolution are scattered throughout the part. The OHA proposes to consolidate most of these references into one section, located in the

introductory subpart to signal its general applicability. The section reflects DOE's policy encouraging the use of Alternative Dispute Resolution and underscores the voluntary nature of the process. It also allows for Alternative Dispute Resolution at any time during the Part 708 process, but advises that the process will not be stayed for Alternative Dispute Resolution. Finally, the section describes to whom the parties must submit written resolutions reached through Alternative Dispute Resolution.

F. § 708.17 Notification of complaints and opportunities to respond

1. In a recent decision, the OHA required the office that initially received the complaint, in that case the Employee Concerns Program, to provide the complainant with the employer's response to the complaint and to allow the complainant an opportunity to submit additional comments thereafter. *In the Matter of Charles K. MacLeod*, Case No. WBU-16-0005 (2016) (Reconsideration). The OHA proposes to codify that requirement in Part 708. The section will also require that the complainant's additional comments be provided to the employer. Such codification allows for a more transparent process.

2. Codification also allows the OHA to stipulate time limits for responses and additional comments. The OHA proposes to extend the time for employers to file a response to 15 days. The time period proposed for the complainant to submit additional comments is 10 days from receipt of the employee's response.

G. § 708.18 Dismissal for lack of jurisdiction or other good cause

1. The OHA proposes to require that decisions dismissing a complaint for lack of jurisdiction or other good cause include the contact information for OHA's Alternative Dispute Resolution Office (ADR Office). Even when a Part 708 complaint is dismissed, the underlying workplace conflict often remains. DOE encourages the use of Alternative Dispute Resolution to resolve conflict at the lowest level, as quickly as possible. Inclusion of the Alternative Dispute Resolution Office's contact information in dismissals may encourage the parties to continue seeking a resolution to their conflict even after their involvement with Part 708 ends.

2. The OHA proposes to extend the time frame for issuance of a decision to dismiss a complaint from 15 to 20 days, in order to accommodate the submission of the employer's response and the complainant's additional comments, pursuant to proposed § 708.17.

H. § 708.19 Appealing a dismissal of a complaint by the Head of Field Element or EC Director for lack of jurisdiction or other good cause

1. The OHA proposes changing the title of this section to specify that it applies to appeals of dismissals by EC Directors or Heads of Field Elements. This will differentiate it from appeals of dismissals by Administrative Judges. The difference is that dismissals by Administrative Judges are initial agency decisions, while dismissals by EC Directors or Heads of Field Elements are not.

2. The OHA proposes adding an appellate standard of review to the section describing its procedures for an appeal of an ECP Director or Head of Field Element dismissal. Standards of review have long been included in other sections of Part 708 and the addition of an appellate

standard enhances consistency and fairness. The OHA proposes using the common appellate standard of review of reviewing findings of fact for clear error and reviewing conclusions of law *de novo*.

3. The OHA proposes to formally specify that appeals are not available concerning decisions not to dismiss a complaint. This has been the OHA's longstanding policy. Adding this language to Part 708 codifies this policy.

4. The OHA proposes to specify that the OHA Director has the powers necessary to adjudicate the appeal proceeding. For example, the OHA Director may order briefing or oral argument from the parties if he deems it necessary. The OHA proposes to add this language to § 708.33 for the same reason.

I. § 708.20 Review by the Secretary of Energy of a decision on appeal of a dismissal

The OHA proposes to formally specify that Secretarial review is not available concerning appellate decisions to reverse a dismissal of a complaint. This has been the OHA's longstanding policy. Adding this language to Part 708 codifies the policy.

J. § 708.21 Referral to the Office of Hearings and Appeals

1. The OHA proposes eliminating the option to have a hearing without an investigation. Over the years, OHA has observed that investigations are crucial to help refine and clarify the issues for hearing. Moreover, the selection of a hearing without an investigation by complainants has been rare. From time to time, a complainant has requested a hearing without an investigation, usually

in an effort to obtain a decision more quickly. In such cases, the hearings typically became far more wide-ranging, unfocused, and inefficient. Without the clarifying work of the investigation, the complainant usually suffers a significant disadvantage, and the task of rendering a decision by the Administrative Judge becomes more complicated as a result, particularly when the complainant lacks legal representation. Accordingly, the benefits of requiring an investigation prior to hearing far outweigh the benefits of maintaining the option for a hearing without an investigation.

2. The OHA proposes to move information regarding the conduct and obligations of OHA personnel and the rights and obligations of parties to § 708.21. These provisions are currently included in § 708.28. However, as they are applicable to appellate proceedings before the OHA, the provisions are properly placed at the beginning of Subpart C to indicate their general applicability.

K. § 708.22 Investigation of complaints

1. The OHA proposes to remove provisions relating to hearings without an investigation, pursuant to revisions to § 708.21.

2. The OHA proposes to amend § 708.22(a) to state that investigators may not participate or advise in a case after the investigation is completed. This revision allows for the elimination of pre-revision § 708.25(b), which stated the same with similar language.

3. The OHA proposes to allow for dismissal of complaints prior to the completion of the investigation. The OHA believes this change will improve the efficiency of the Part 708 process, while still fully protecting the parties' rights. Occasionally, it becomes immediately clear after the investigation starts that the complaint lacks merit or that the OHA lacks jurisdiction. In such cases, it could be a waste of the parties' and the OHA's time and resources to continue with a full investigation. Allowing for dismissal prior to the completion of the investigation—while still providing an opportunity for appellate review if dismissal is believed to be in error—will help to eliminate this waste and streamline the process.

Under the proposed revision, in the event that a complaint, upon preliminary investigation, is believed by the investigator to be clearly without merit or to lack a jurisdictional basis, the investigator may request that the OHA Director appoint an Administrative Judge to make a formal determination regarding whether dismissal is appropriate. The investigator will provide a written statement to the Administrative Judge that will outline the factual and legal reasons the investigator has for referring the complaint for dismissal. If the Administrative Judge does decide to dismiss the complaint, he will issue a decision containing the factual and legal bases for dismissal, and serve the decision on all the parties, along with the investigator's written statement. If the Administrative Judge decides not to dismiss the complaint, he will issue a written statement to be served all the parties and order the investigation to continue. The Administrative Judge may ask the OHA Director to appoint a new investigator.

Under the proposed revision, for an investigator to refer a complaint for dismissal, he must believe that there is no genuine dispute of material fact and the complainant's claims are wholly

without merit, or that the complaint warrants dismissal for one of the reasons listed in § 708.18(c). A dismissal for lack of merit prior to the completion of an investigation will seldom occur, as the applicable standard is quite difficult to meet. First, there must appear to be no dispute among the parties as to the relevant facts. Second, in light of those undisputed facts, the complainant's claims must lack merit—i.e., fail to give rise to an entitlement to relief under Part 708. Under those circumstances, and only under those circumstances, may the investigator refer the complaint to an Administrative Judge for dismissal on the merits. The Administrative Judge may exercise all powers necessary, including requesting submissions from the parties, to evaluate whether dismissal is appropriate. If the Administrative Judge disagrees with the investigator's assessment and finds that the parties do not agree on all of the relevant facts or that the claims are not entirely without merit, he must decline to dismiss the complaint. If the Administrative Judge does dismiss the complaint, appeal to the OHA Director and, if that fails, Secretarial review are available to the complainant.

4. The OHA proposes that no report of investigation will be issued when a complaint is dismissed prior to the completion of the investigation. Without a full investigation, the report of investigation would be incomplete. However, the Administrative Judge will issue an initial agency decision that will include a summary of the factual findings available, which would normally be included in a report of investigation, as well as legal conclusions sufficient to support an initial agency decision. The Administrative Judge will serve the decision on all parties.

5. The OHA proposes that the procedures in §§ 708.32-708.35 apply to an appeal of a dismissal of a complaint before completion of the investigation. These sections govern appeals of all other initial agency decisions under Part 708. The OHA proposes amendments to those sections and others to accommodate appeals of initial agency decisions issued prior to completion of the investigation, such that all parties are afforded the same due process.

L. § 708.23 Time to issue a report of investigation

The OHA proposes to toll the time to issue a report of investigation pending an Administrative Judge's decision on whether to dismiss a case referred for such purpose by an investigator. OHA investigations are quite comprehensive and require significant time to complete. Tolling the time to issue the report of investigation is necessary to ensure that investigators do not lose valuable time while waiting for an Administrative Judge to issue a decision.

M. § 708.26 Time and location of hearings

The OHA proposes to codify the option to conduct Part 708 hearings via video teleconference. While this option is already available, adding it to the regulation increases transparency and informs litigants of this option. Video teleconferencing preserves Department resources while maintaining the integrity of the proceedings. The OHA currently conducts nearly 90 percent of its personnel security hearings via video teleconference and has been successful in maintaining the benefits of an in-person hearing while reducing the OHA's travel costs to a fraction of their previous levels.

N. § 708.27 The Administrative Judge may not require that the parties participate in alternative dispute resolution

The OHA proposes to amend the language of § 708.27 to clarify the section's purpose. Prior to these revisions, many readers interpreted the language of this section as an endorsement of Alternative Dispute Resolution similar to others already in the regulation. However, the purpose of § 708.27 is to prohibit an Administrative Judge from requiring participation in Alternative Dispute Resolution. Unlike many state and federal court systems where Alternative Dispute Resolution may be ordered, DOE is committed to maintaining a voluntary Alternative Dispute Resolution process. Accordingly, Alternative Dispute Resolution is widely encouraged, but may not be required for litigants of Part 708 complaints.

O. § 708.28 Hearing Procedures

The OHA proposes to clarify that Administrative Judges issue rulings that might result in termination of the proceeding before completion of the hearing. This is permitted under the current regulation, however the proposed language is clearer and less vulnerable to ambiguity.

P. § 708.30 Timing for issuing an initial agency decision

The OHA proposes to separate the timing of issuing an initial agency decision from the procedures for issuing such.

Q. § 708.31 Procedure for issuing an initial agency decision

The OHA proposes to consolidate the procedures for issuing an initial agency decision and the procedures for issuing an initial agency decision if no hearing was conducted. The procedures

are identical and separating the standards is redundant. The OHA has also moved procedural provisions from § 708.30 to § 708.31, creating separate sections for timing and procedure.

R. § 708.33 Procedure for appeals

The OHA proposes adding an appellate standard of review to the section describing its procedures for an appeal of an initial agency decision. Standards of review have long been included in other sections of Part 708 and the addition of an appellate standard lends itself to consistency and fairness. The OHA proposes using the common appellate standard of review of reviewing findings of fact for clear error and reviewing conclusions of law *de novo*. Under the current regulations, the appellate procedure allows the OHA Director to initiate an investigation and to consider new facts and evidence discovered in the appeal decision. This practice is at odds with the proposed appellate standard and subverts the deference to be owed to the Administrative Judge's fact finding. Accordingly, the OHA proposes to remove this provision.

2. The OHA proposes to specify that the OHA Director has the powers necessary to adjudicate the appeal proceeding. For example, the OHA Director may order briefing or oral argument from the parties if he deems it necessary. The OHA proposes to add this language to § 708.19 for the same reason.

S. § 708.34 Procedure for issuing an appeal decision

1. The OHA proposes to specify two additional ways in which the OHA Director may rule on an appeal of an initial agency decision. These additional types of rulings are tailored for those situations where the complainant is appealing the dismissal of his complaint prior to completion

of the investigation. Specifically, if the OHA Director determines that the complaint was properly dismissed by the Administrative Judge, he will deny the appeal. If he determines the complaint should not have been dismissed, he will vacate the initial agency decision and order further processing of the complaint.

2. The OHA proposes to specify that an appeal decision to reverse dismissal of a complaint is not a final agency action and is not subject to a petition for Secretarial review. This has been the OHA's longstanding policy. Adding this language to Part 708 codifies the policy.

T. § 708.40 Notice of program requirements

The OHA proposes that employers covered by Part 708 be required to post the telephone number and website or email address of the DOE office at which employees may file complaints. This will be in addition to the existing requirement that employers post the name and address of such DOE office. Paperless communication is encouraged at DOE and the new contact information provided will further the Department's effort to increase the usage of paperless communication.

U. § 708.42 Extension of Deadlines

The OHA proposes to limit remedies available where OHA has not met Part 708's timing requirements. A decision should not be vulnerable to reversal simply because the OHA or other DOE component does not issue it in a timely manner. Specifically, failure by the DOE to comply with timing requirements does not create a substantive right for any party to overturn a DOE decision on a complaint. The OHA and all DOE components will continue to strive to meet all requirements and deadlines.

III. Public Comment Procedures

Interested persons are invited to participate in this rulemaking proceeding by submitting data, views, or arguments. Written comments should be submitted to the address, and in the form, indicated in the **ADDRESSES** section of this notice of proposed rulemaking. To help DOE's review of the comments, interested persons are asked to refer to specific proposed rule provisions, if possible.

The OHA would like to specifically request comment on two elements of the proposed rule:

1. The procedure by which complaints may be dismissed during investigations; and
2. Whether the OHA should be required by the regulation to appoint a new investigator in the event that a case is not dismissed after being referred for dismissal during an investigation.

If you submit information that you believe to be exempt by law from public disclosure, you should submit one complete copy, as well as one copy from which the information requested to be exempt by law from public disclosure has been redacted. DOE is responsible for the final determination regarding disclosure or nondisclosure of the information, and for treating information accordingly under the Freedom of Information Act and DOE implementing regulations at 10 CFR part 1004.

IV. Regulatory Review

A. Executive Order 12866

It was determined that this action is not a significant regulatory action subject to review under Executive Order 12866, “Regulatory Planning and Review,” 58 FR 51735 (Oct. 4, 1993) by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

B. Executive Orders 13771, and 13777

On January 30, 2017, the President issued Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs.” That Order stated the policy of the executive branch is to be prudent and financially responsible in the expenditure of funds, from both public and private sources. The Order stated it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations.

Additionally, on February 24, 2017, the President issued Executive Order 13777, “Enforcing the Regulatory Reform Agenda.” The Order required the head of each agency designate an agency official as its Regulatory Reform Officer (RRO). Each RRO oversees the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms, consistent with applicable law. Further, E.O. 13777 requires the establishment of a regulatory task force at each agency. The regulatory task force is required to make recommendations to the agency head regarding the repeal, replacement, or modification of existing regulations, consistent with applicable law. At a minimum, each regulatory reform task force must attempt to identify regulations that:

- (i) Eliminate jobs, or inhibit job creation;
- (ii) Are outdated, unnecessary, or ineffective;

- (iii) Impose costs that exceed benefits;
- (iv) Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;
- (v) Are inconsistent with the requirements of Information Quality Act, or the guidance issued pursuant to that Act, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or
- (vi) Derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

Pursuant to OMB's *Guidance Implementing Executive Order 13771, Titled "Reducing Regulation and Controlling Regulatory Costs"* (April 5, 2017), this action does not constitute an "EO 13771 regulatory action" because it does not meet the EO 12866 definition of a significant regulatory action. DOE determined, however, that this action furthers the policy goals outlined in Executive Order 13777, "Enforcing the Regulatory Reform Agenda," which encourages the repeal, replacement, or modification of existing regulations that, among other things, are outdated, unnecessary, or ineffective. Prior to this action, Part 708 was outdated and, in some sections, inefficient. This action clarifies the regulation and streamlines the proceedings, which should result in increased time and resource savings for litigants and DOE.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the

agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of General Counsel’s Web site: <http://www.gc.doe.gov>.

DOE has reviewed this proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. This proposed rule would alter procedural rules primarily for the OHA, with little impact on the conduct of or burdens on litigants. DOE has determined that the proposed rule, if adopted, would not result in a significant economic impact on a substantial number of small entities because few small entities are involved in Part 708 proceedings and because the proposed rule contains few changes in the obligations of the litigants.

DOE will provide its certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

D. The Paperwork Reduction Act of 1995

Proposed Part 708 does not contain information collection requirements subject to review and approval by OMB under the Paperwork Reduction Act.

E. The Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and tribal governments. Section 101(5) of title I of that law defines a Federal intergovernmental mandate to include any regulation that would impose upon State, local, or tribal governments an enforceable duty, except a condition of Federal assistance or a duty arising from participating in a voluntary Federal program. Title II of that law requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments, in the aggregate, or to the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute. Section 202 of that title requires a Federal agency to perform a detailed assessment of the anticipated costs and benefits of any rule that includes a Federal mandate which may result in costs to State, local, or tribal governments, or to the private sector, of \$100 million or more in any one year (adjusted annually for inflation). 2 U.S.C. 1532(a) and (b). Section 204 of that title requires each agency that proposes a rule containing a significant Federal intergovernmental mandate to develop an effective process for obtaining meaningful and timely input from elected officers of State, local, and tribal governments. 2 U.S.C. 1534.

The proposed rule will not result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, of \$100 million or more in any one year. Accordingly, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

F. The Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well-being. The proposed rule will not have any impact on the autonomy

or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

G. Executive Order 13132

Executive Order 13132, “Federalism,” 64 FR 43255 (Aug. 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this proposed rule and has determined that it will not preempt State law and will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

H. Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, “Civil Justice Reform,” 61 FR 4729 (Feb. 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any;

(2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or whether it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed rule meets the relevant standards of Executive Order 12988.

I. Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB.

OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

J. Delegations

All DOE delegation orders may be accessed at <https://www.directives.doe.gov/>.

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notice of proposed rulemaking.

List of Subjects in 10 CFR Part 708

Administrative practice and procedure; Whistleblower Protection

Signed in Washington, DC on: April 22, 2019

Poli A. Marmolejos

Director

Office of Hearings and Appeals

For the reasons set out in the preamble, the DOE proposes to revise part 708 of title 10, Code of Federal Regulations to read as follows:

PART 708—DOE CONTRACTOR EMPLOYEE PROTECTION PROGRAM

Subpart A—General Provisions

§ 708.1 Scope and purpose.

§ 708.2 Definitions.

§ 708.3 Complaints covered.

§ 708.4 Complaints not covered.

§ 708.5 Protected conduct.

§ 708.6 Reasonable fear of serious injury.

§ 708.7 Filing a complaint based on retaliation for refusal to participate.

§ 708.8 Application to pending cases.

§ 708.9 How to file complaints or other documents.

§ 708.10 Informal resolution of complaints.

Subpart B—Employee Complaint Resolution Process

§ 708.11 Filing a complaint.

§ 708.12 No expectation of confidentiality.

§ 708.13 Requirements for the form and content of a complaint.

§ 708.14 Exhaustion of grievance-arbitration procedures.

§ 708.15 Time to file a complaint.

§ 708.16 Duplicative actions under State or other law.

§ 708.17 Notification of complaints and opportunities to respond.

§ 708.18 Dismissal for lack of jurisdiction or other good cause.

§ 708.19 Appealing the dismissal of a complaint by the Head of Field Element or EC Director for lack of jurisdiction or other good cause.

§ 708.20 Review by the Secretary of Energy of a decision on appeal of a dismissal.

Subpart C—Investigation, Hearing and Decision Process

§ 708.21 Referral to the Office of Hearings and Appeals.

§ 708.22 Investigation of complaints.

§ 708.23 Time to issue a report of investigation.

§ 708.24 Hearings not required.

§ 708.25 Appointment of Administrative Judge.

§ 708.26 Time and location of hearings.

§ 708.27 The Administrative Judge may not require that the parties participate in alternative dispute resolution.

§ 708.28 Hearing Procedures.

§ 708.29 Burdens of Proof.

§ 708.30 Timing for issuing an initial agency decision.

§ 708.31 Procedure for issuing an initial agency decision.

§ 708.32 Appealing an initial agency decision.

§ 708.33 Procedure for appeals.

§ 708.34 Procedure for issuing an appeal decision.

§ 708.35 Review by the Secretary of Energy of an appeal decision.

§ 708.36 Remedies.

§ 708.37 Reimbursement of costs and expenses.

§ 708.38 Implementation of final agency decision.

§ 708.39 Sections 6 and 7 of the Contract Disputes Act.

§ 708.40 Notice of program requirements.

§ 708.41 Referral to another agency.

§ 708.42 Extension of deadlines.

§ 708.43 Affirmative duty not to retaliate.

Authority: 42 U.S.C. 2201(b), 2201(c), 2201(i), and 2201(p); 42 U.S.C. 5814 and 5815; 42 U.S.C. 7251, 7254, 7255, and 7256; and 5 U.S.C. Appendix 3.

Subpart A—General Provisions

§ 708.1 Scope and purpose.

This part provides procedures for processing complaints by employees of DOE contractors alleging retaliation by their employers for disclosure of information concerning danger to public or worker health or safety, substantial violations of law, or gross mismanagement; for participation in Congressional proceedings; or for refusal to participate in dangerous activities.

§ 708.2 Definitions.

(a) For purposes of this part:

Administrative Judge means an attorney appointed by the OHA Director to preside over the disposition of a complaint.

Alternative Dispute Resolution means any technique for resolving disputes and managing conflict without resorting to litigation in either an administrative or judicial forum. Alternative Dispute Resolution techniques include, but are not limited to, mediation, facilitation, shuttle diplomacy, partnering, and dispute systems design.

Complainant means an employee who has filed a complaint under 10 CFR part 708.

Contractor means a seller of goods or services who is a party to a management and operating contract or other type of contract with DOE, or subcontract to such a contract, to perform work directly related to activities at DOE-owned or -leased facilities.

Day means a calendar day.

Discovery means a process used to enable the parties to learn about each other's evidence before a hearing takes place, including oral depositions, written interrogatories, requests for admissions, inspection of property, and requests for production of documents.

DOE Official means any officer or employee of DOE whose duties include program management or the investigation or enforcement of any law, rule, or regulation relating to Government contractors or the subject matter of a contract.

EC Director means the Director of the Office of Employee Concerns at DOE Headquarters, or any official to whom the Director delegates his functions under this part.

Employee means a person employed by a contractor, and any person previously employed by a contractor if that person's complaint alleges that employment was terminated for conduct described in § 708.5 of this subpart A.

Field element means a DOE operations office or field office that is responsible for the management, coordination, and administration of operations at a DOE facility.

Head of Field Element means the manager or head of a DOE operations office or field office, or any official to whom those individuals delegate their functions under this part.

Management and operating contract means an agreement under which DOE contracts for the operation, maintenance, or support of a Government-owned or -leased research, development, special production, or testing establishment that is wholly or principally devoted to one or more of the programs of DOE.

OHA Director means the Director of the Office of Hearings and Appeals, or any official to whom the Director delegates his functions under this part.

Party means an employee, contractor, or other party named in a proceeding under this part.

Retaliation means an action (including intimidation, threats, restraint, coercion, or similar action) taken by a contractor against an employee with respect to employment (*e.g.*, discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions, or privileges of employment) that would not have been taken but for the employee's disclosure of information, participation in proceedings, or refusal to participate in activities described in § 708.5 of this subpart.

(b) Throughout this part, the use of a word or term in the singular includes the plural, and the use of the male gender is gender neutral.

§ 708.3 Complaints covered.

This part applies to a complaint of retaliation filed by an employee of a contractor that performs work on behalf of DOE, directly related to activities at a DOE-owned or -leased site, if the complaint stems from a disclosure, participation, or refusal described in § 708.5 of this subpart.

§ 708.4 Complaints not covered.

An employee of a contractor may not file a complaint against his employer under this part if:

- (a) The complaint is based on race, color, religion, sex, age, national origin, or other similar basis; or
- (b) The complaint involves misconduct that the employee, acting without direction from the employer, deliberately caused, or in which the employee knowingly participated; or
- (c) Except as provided in § 708.15(a), the complaint is based on the same facts for which the employee has chosen to pursue a remedy available under:

- (1) Department of Labor regulations at 29 CFR part 24, “Procedures for the Handling of Discrimination Complaints under Federal Employee Protection Statutes;”
- (2) Federal Acquisition Regulations, 48 CFR part 3, “Federal Acquisition Regulation; Whistleblower Protection for Contractor Employees (Ethics);” or
- (3) State or other applicable law, including final and binding grievance-arbitration, as described in § 708.16 of subpart B; or
- (d) The complaint is based on the same facts in which the employee, in the course of a covered disclosure or participation, improperly disclosed Restricted Data, national security information, or any other classified or sensitive information in violation of any Executive Order, statute, or regulation. This part does not override any provision or requirement of any regulation pertaining to Restricted Data, national security information, or any other classified or sensitive information; or
- (e) The complaint deals with “terms and conditions of employment” within the meaning of the National Labor Relations Act, except as provided in § 708.5.

§ 708.5 Protected conduct.

An employee of a contractor may file a complaint against his employer alleging that he has been subject to retaliation for:

- (a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, the employer, or any higher tier contractor, information that he reasonably believes reveals—
 - (1) A substantial violation of a law, rule, or regulation;
 - (2) A substantial and specific danger to employees or to public health or safety; or

- (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or
- (b) Participating in a Congressional proceeding or an administrative proceeding conducted under this part; or
- (c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if the employee believed participation would—
 - (1) Constitute a violation of a Federal health or safety law; or
 - (2) Cause the employee to have a reasonable fear of serious injury to himself, other employees, or members of the public.

§ 708.6 Reasonable fear of serious injury.

Participation in an activity, policy, or practice may cause an employee to have a reasonable fear of serious injury that justifies a refusal to participate if:

- (a) A reasonable person, under the circumstances that confronted the employee, would conclude there is a substantial risk of a serious accident, injury, or impairment of health or safety resulting from participation in the activity, policy, or practice; or
- (b) An employee, because of the nature of his employment responsibilities, does not have the training or skills needed to participate safely in the activity or practice.

§ 708.7 Filing a complaint based on retaliation for refusal to participate.

An employee may file a complaint for retaliation for refusing to participate in an activity, policy, or practice only if:

- (a) Before refusing to participate in the activity, policy, or practice, the employee asked the employer to correct the violation or remove the danger, and the employer refused to take such action; and

(b) By the 30th day after the refusal to participate, the employee reported the violation or dangerous activity, policy, or practice to a DOE official, a member of Congress, another government official with responsibility for the oversight of the conduct of operations at the DOE site, his employer, or any higher tier contractor, and stated his reasons for refusing to participate.

§ 708.8 Application to pending cases.

The procedures in this part apply in any complaint proceeding filed with the Head of Field Element or EC Director, as appropriate, on or after the effective date of this part.

§ 708.9 How to file complaints or other documents.

(a) Under this part, a complaint or other document is considered filed on the date it is mailed, electronically submitted, or personally delivered to the specified official or office.

(b) A complaint may be withdrawn at any time at the request of the complainant.

(c) Absent exceptional circumstances, all submissions to the Office of Hearings and Appeals must be filed electronically in accordance with the instructions set forth on the Office of Hearings and Appeals website, found at *<https://www.energy.gov/oha/filing-information>*. The Office of Hearings and Appeals may grant permission to file via mail or facsimile.

§ 708.10 Informal resolution of complaints.

(a) DOE encourages the use of alternative dispute resolution. If the parties are willing, they can seek to utilize alternative dispute resolution techniques, such as settlement discussions or mediation, in an attempt to resolve the complaint.

(b) The parties may engage in alternative dispute resolution at any time prior to the issuance of an initial agency decision.

(c) If the parties resolve the complaint informally, the Head of Field Element, EC Director, and the Office of Hearings and Appeals must be given a copy of the settlement agreement or a written statement from the employee that withdraws the complaint.

Subpart B—Employee Complaint Resolution Process

§ 708.11 Filing a complaint.

(a) If an employee was employed by a contractor whose contract is overseen by a contracting officer located in DOE Headquarters when the alleged retaliation occurred, the employee must file the written complaint with the EC Director.

(b) If an employee was employed by a contractor at a DOE field facility or site when the alleged retaliation occurred, the employee must file the written complaint with the Head of Field Element at the DOE field element with jurisdiction over the contract.

§ 708.12 No expectation of confidentiality.

The identity of an employee who files a complaint under this part appears on the complaint. A copy of the complaint is provided to the employer and the complainant's identity cannot be maintained as confidential.

§ 708.13 Requirements for the form and content of a complaint.

A complaint does not need to be in any specific form but must be signed by the employee and contain the following:

(a) A statement specifically describing

(1) The alleged retaliation taken against the employee and

(2) The disclosure, participation, or refusal covered under § 708.5 that the employee believes gave rise to the retaliation;

- (b) A statement that the complainant is not currently pursuing a remedy under State or other applicable law, as described in § 708.16 of this subpart B;
- (c) A statement that all of the facts that the complainant has included in his complaint are true and correct to the best of his knowledge and belief; and
- (d) An affirmation, as described in § 708.14 of this subpart, that the complainant has exhausted all applicable grievance or arbitration procedures.

§ 708.14 Exhaustion of grievance-arbitration procedures.

(a) To show that all applicable grievance-arbitration procedures have been exhausted, the complainant must:

- (1) State that all available opportunities for resolution through an applicable grievance-arbitration procedure have been exhausted, and provide the date on which the grievance-arbitration procedure was terminated and the reasons for termination; or
- (2) State that the complainant filed a grievance under applicable grievance-arbitration procedures, but more than 150 days have passed and a final decision on it has not been issued, and provide the date that the grievance was filed; or
- (3) State that the employer has established no grievance-arbitration procedures.

(b) If the complainant does not provide the information specified in § 708.14(a), the complaint may be dismissed for lack of jurisdiction as provided in § 708.18 of this subpart B.

§ 708.15 Time to file a complaint.

(a) A complaint must be filed by the 90th day after the date the employee knew, or reasonably should have known, of the alleged retaliation.

(b) The period for filing a complaint does not include time spent attempting to resolve the dispute through an internal company grievance-arbitration procedure. The time period for filing stops running on the day the internal grievance is filed and begins to run again on the earlier of:

(1) The day after such dispute resolution efforts end; or

(2) 150 days after the internal grievance was filed if a final decision on the grievance has not been issued.

(c) The period for filing a complaint does not include time spent resolving jurisdictional issues related to a complaint the employee files under State or other applicable law. The time period for filing stops running on the date the complaint under State or other applicable law is filed and begins to run again the day after a final decision on the jurisdictional issues is issued.

(d) If the complaint is not filed during the 90-day period, the Head of Field Element or EC Director (as applicable) will give the complainant an opportunity to show any good reason he may have for not filing within that period, and that official may, in his discretion, accept the complaint for processing.

§ 708.16 Duplicative actions under State or other law.

(a) An employee may not file a complaint under this part if, with respect to the same facts, he chooses to pursue a remedy under State or other applicable law, including final and binding grievance-arbitration procedures, unless:

(1) The complaint under State or other applicable law is dismissed for lack of jurisdiction;

(2) The complaint was filed under 48 CFR part 3, Subpart 3.9 and the Inspector General, after conducting an initial inquiry, determines not to pursue it; or

- (3) The employee has exhausted grievance-arbitration procedures pursuant to § 708.14, and issues related to alleged retaliation for conduct protected under § 708.5 remain.
- (b) Pursuing a remedy other than final and binding grievance-arbitration procedures does not prevent an employee from filing a complaint under this part.
- (c) An employee is considered to have filed a complaint under State or other applicable law if he files a complaint, or other pleading, with respect to the same facts in a proceeding established or mandated by State or other applicable law, whether such a complaint is filed before, concurrently with, or after a complaint is filed under this part.
- (d) If an employee files a complaint under State or other applicable law after filing a complaint under this part, the complaint under this regulation will be dismissed under § 708.18(c)(3).

§ 708.17 Notification of complaints and opportunities to respond.

- (a) By the 15th day after receiving a complaint, the Head of Field Element or EC Director (as applicable) will provide the employer a copy of the complaint. The employer has 15 days from receipt of the complaint to submit any response it wishes to make regarding the allegations in the complaint. The Head of Field Element or EC Director (as applicable) will provide the complainant with a copy of the employer's response. The complainant has 10 days from receipt of the response to submit any additional comments regarding the complaint or the response. The Head of Field Element or EC Director (as applicable) will provide the employer with a copy of those additional comments.
- (b) If the complainant is part of a bargaining unit represented for purposes of collective bargaining by a labor organization, the Head of Field Element or EC Director (as applicable) will provide the representative a copy of the complaint by the 15th day after receiving it. The labor

organization will be advised that it has 10 days from the receipt of the complaint to submit any comments it wishes to make regarding the allegations in the complaint.

§ 708.18 Dismissal for lack of jurisdiction or other good cause.

(a) The Head of Field Element or EC Director (as applicable) may dismiss a complaint for lack of jurisdiction or for other good cause after receiving the complaint, either on his own initiative or at the request of a party named in the complaint. Such decisions are generally issued by the 20th day after the receipt of the employer's response, but not before the complainant has submitted comments on the response or his time to do so has elapsed, whichever is soonest.

(b) The Head of Field Element or EC Director (as applicable) will notify the complainant by certified mail, return receipt requested, if the complaint is dismissed for lack of jurisdiction or other good cause, will give specific reasons for the dismissal and the contact information for the DOE's Alternative Dispute Resolution Office, and will notify other parties of the dismissal.

(c) Dismissal for lack of jurisdiction or other good cause is appropriate if:

- (1) The complaint is untimely; or
- (2) The facts, as alleged in the complaint, do not present issues for which relief can be granted under this part; or
- (3) The complainant filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint under this part; or
- (4) The complaint is frivolous or without merit on its face; or
- (5) The issues presented in the complaint have been rendered moot by subsequent events or substantially resolved; or

(6) The employer has made a formal offer to provide the remedy requested in the complaint or a remedy that DOE considers to be equivalent to what could be provided as a remedy under this part.

§ 708.19 Appealing the dismissal of a complaint by the Head of Field Element or EC

Director for lack of jurisdiction or other good cause.

(a) If a complaint is dismissed by the Head of Field Element or EC Director, the administrative process is terminated unless the complainant appeals the dismissal to the OHA Director by the 10th day after receipt of the notice of dismissal as evidenced by a receipt for delivery of certified mail. Decisions not to dismiss may not be appealed.

(b) If the complainant appeals a dismissal to the OHA Director, he must send copies of his appeal to the Head of Field Element or EC Director (as applicable) and all parties. The appeal must include a copy of the notice of dismissal, and state the reasons the dismissal was erroneous.

(c) The OHA Director has all powers necessary to adjudicate the appeal. The OHA Director will issue a decision on the appeal and notify the parties of the decision by the 30th day after it is received. The OHA Director will review findings of fact for clear error and conclusions of law *de novo*.

(d) The OHA Director's decision, either upholding the dismissal by the Head of Field Element or EC Director or ordering further processing of the complaint, is the final decision on the appeal, unless a party files a petition for Secretarial review by the 30th day after receiving the appeal decision.

§ 708.20 Review by the Secretary of Energy of a decision on appeal of a dismissal.

(a) By the 30th day after receiving a decision on an appeal under § 708.19 from the OHA Director, any party may file a petition for Secretarial review of a dismissal with the Office of

Hearings and Appeals. A decision by the OHA Director to reverse a dismissal may not be the subject of a petition for Secretarial review.

(b) By the 15th day after filing the petition for Secretarial review, the petitioning party must file a statement setting forth the arguments in support of its position. A copy of the statement must be served on the other parties, who may file a response by the 20th day after receipt of the statement. Any response must also be served on the other parties.

(c) All submissions permitted under this section must be filed with the Office of Hearings and Appeals.

(d) The Secretary (or his designee) will reverse or revise an appeal decision by the OHA Director only under extraordinary circumstances. Upon consideration of the petition for Secretarial review, the Secretary will direct the OHA Director to issue an order either upholding the dismissal by the Head of Field Element or EC Director or ordering further processing of the complaint. If the dismissal is upheld, this is a final agency action.

Subpart C—Investigation, Hearing and Decision Process

§ 708.21 Referral to the Office of Hearings and Appeals.

(a) If a complaint is not dismissed for lack of jurisdiction or other good cause, the Head of Field Element or EC Director (as applicable) will forward the complaint to the OHA Director by the later of:

- (1) The 25th day after receipt of the employer's response, or
- (2) The 5th day after receipt of an order to continue processing the complaint following an appeal of dismissal.

(b) The Head of the Field Element or EC Director (as applicable) will notify all parties that the complaint has been referred to the Office of Hearings and Appeals.

(c) The OHA Director and an Administrative Judge appointed to preside over any aspect of a Part 708 proceeding are prohibited, beginning with the complaint's referral to the OHA and until a final agency decision is issued, from initiating or otherwise engaging in *ex parte* discussions with any party on the merits of the complaint.

(d) In all proceedings under this subpart:

(1) The parties have the right to be represented by a person of their choosing or to proceed without representation. The parties are responsible for producing witnesses on their behalf, including requesting the issuance of subpoenas, if necessary;

(2) Formal rules of evidence do not apply, but the OHA may use the Federal Rules of Evidence as a guide.

§ 708.22 Investigation of complaints.

(a) The OHA Director will appoint a person to conduct an investigation. The investigator may not participate or advise in any proceedings in the case subsequent to the investigation's completion.

(b) The investigator will determine the appropriate scope of investigation based on the circumstances of the complaint. The investigator may enter and inspect places and records; make copies of records; interview persons alleged to have been involved in retaliation and other individuals who may have relevant information; take sworn statements; and require the production of any documents or other evidence.

(c) All parties must cooperate fully with the investigator by making all pertinent evidence available. The contractor must make employees available upon request.

(d) A person being interviewed in an investigation has the right to be represented by a person of his choosing.

(e) Parties to the complaint are not entitled to be present at interviews conducted by an investigator.

(f) If a person other than the complainant requests that his identity be kept confidential, the investigator may grant confidentiality, but must advise such person that confidentiality means that the Office of Hearings and Appeals will not identify the person as a source of information to anyone outside the Office of Hearings and Appeals, except as required by statute or other law, or as determined by the OHA Director to be unavoidable.

(g) At any point during the investigation, the investigator may request that the OHA Director appoint an Administrative Judge to whom the complaint will be referred for a decision on whether dismissal is appropriate. The investigator will serve the parties with notice of the referral. The investigator will submit a written statement to the Administrative Judge outlining the reasons he believes dismissal may be appropriate and any facts supporting that belief. The Administrative Judge will then decide whether to dismiss the complaint. In making such decision, the Administrative Judge will have access to the entire investigative file. A complaint may be dismissed prior to the completion of the investigation for:

(1) Any reason listed in § 708.18(c), or

(2) Lack of merit, provided the facts obtained by the investigator indicate there is no genuine dispute of material fact.

The Administrative Judge's decision, regardless of outcome, will be served on all the parties.

(h) If the Administrative Judge decides to dismiss the complaint, he will issue an initial agency decision that includes the factual and legal bases for the dismissal. The investigator's written

statement will be attached to the Administrative Judge's initial agency decision and served on all the parties. No report of investigation will issue for a complaint dismissed by the Administrative Judge following a referral for dismissal by the investigator.

(i) If the Administrative Judge decides not to dismiss the complaint, he will issue a written statement to that effect which will include the factual and legal basis for his decision. The investigation will then continue. The OHA Director may, at his discretion, appoint a new investigator.

(j) Dismissals under § 708.22(h) may be appealed in accordance with the procedures set forth in §§ 708.32, 708.33, 708.34, and § 708.35. Decisions not to dismiss under § 708.22(i) may not be appealed.

§ 708.23 Time to issue a report of investigation.

(a) If the complaint is not dismissed prior to the completion of the investigation, the investigator will complete the investigation and issue a report of investigation by the 60th day after the complaint is received by the Office of Hearings and Appeals, unless the OHA Director, for good cause, extends the investigation for no more than 30 days. If a case is referred for dismissal by an investigator, the time to issue the report of investigation stops running on the day of referral and, if the Administrative Judge decides against dismissal, begins to run again on the day after the Administrative Judge's decision issues.

(b) The investigator will provide copies of the report of investigation to the parties. The investigation will not be reopened after the report of investigation is issued.

§ 708.24 Hearings not required.

(a) A complainant may withdraw a hearing request after the report of investigation is issued. However, the hearing may be canceled only if all parties agree that they do not want a hearing.

(b) If the hearing is canceled, the Administrative Judge will issue an initial agency decision pursuant to § 708.31 of this subpart C.

§ 708.25 Appointment of Administrative Judge.

The OHA Director will appoint an Administrative Judge from the Office of Hearings and Appeals to conduct a hearing.

§ 708.26 Time and location of hearings.

(a) The Administrative Judge will schedule a hearing to be held by the 90th day after issuance of the report of investigation. Any extension of the hearing date must be approved by the OHA Director.

(b) The Administrative Judge will schedule the hearing for a location near the site where the alleged retaliation occurred or the complainant's place of employment, or at another location that is appropriate considering the circumstances of a particular case. Hearings may be conducted by video teleconference or other remote means, at the Administrative Judge's discretion.

§ 708.27 The Administrative Judge may not require that the parties participate in alternative dispute resolution.

The Administrative Judge may recommend, but may not require, that the parties attempt to resolve the complaint through alternative dispute resolution. Within 5 days of appointment, the Administrative Judge will make the contact information for the DOE's Alternative Dispute Resolution Office available to the parties.

§ 708.28 Hearing Procedures.

(a) In all hearings under this part:

- (1) Testimony of witnesses is given under oath or affirmation, and witnesses must be advised of the applicability of 18 U.S.C. 1001 and 18 U.S.C. 1621, dealing with the criminal penalties associated with false statements and perjury;
 - (2) Witnesses are subject to cross-examination; and
 - (3) A court reporter will make a transcript of the hearing.
- (b) The Administrative Judge has all powers necessary to regulate the conduct of proceedings, including the following.
- (1) The Administrative Judge may order discovery at the request of a party, based on a showing that the requested discovery is designed to produce evidence regarding a matter, not privileged, that is relevant to the subject matter of the complaint.
 - (2) The Administrative Judge may permit parties to obtain discovery by any appropriate method, including deposition upon oral examination or written questions; written interrogatories; production of documents or things; permission to enter upon land or other property for inspection and other purposes; and requests for admission.
 - (3) The Administrative Judge may issue subpoenas for the appearance of witnesses on behalf of either party, or for the production of specific documents or other physical evidence.
 - (4) The Administrative Judge may rule on objections to the presentation of evidence; exclude evidence that is immaterial, irrelevant, or unduly repetitious; require the advance submission of documents offered as evidence; dispose of procedural requests; grant extensions of time; determine the format of the hearing; direct that written motions, documents, or briefs be filed with respect to issues raised during the course of the hearing; ask questions of witnesses; direct that documentary evidence be served upon

other parties (under protective order if such evidence is deemed confidential); and otherwise regulate the conduct of the hearing.

(5) The Administrative Judge may, at the request of a party or on his own initiative, dismiss a claim, defense, or party. He may also make adverse findings upon the failure of a party or the party's representative to comply with a lawful order of the Administrative Judge, or, without good cause, to attend a hearing. If the Administrative Judge's rulings result in termination of the proceeding prior to the completion of the hearing, the Administrative Judge will issue an initial agency decision pursuant to § 708.31 of this subpart C.

(6) The Administrative Judge, upon request of a party, may allow the parties a reasonable time to file pre-hearing briefs or written statements with respect to material issues of fact or law. Any pre-hearing submission must be limited to the issues specified and filed within the time prescribed by the Administrative Judge.

(7) The parties are entitled to make closing arguments, but post-hearing submissions are only permitted by direction of the Administrative Judge.

(8) Parties allowed to file written submissions must serve copies upon the other parties within the time prescribed by the Administrative Judge.

§ 708.29 Burdens of Proof.

The complainant has the burden of establishing by a preponderance of the evidence that he made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the complainant by the contractor. Once the complainant has met this burden, the burden shifts to the

contractor to prove by clear and convincing evidence that it would have taken the same action without the complainant's disclosure, participation, or refusal.

§ 708.30 Timing for issuing an initial agency decision.

The Administrative Judge will issue an initial agency decision on the complaint by the 60th day after the later of:

- (a) The date the Administrative Judge approves the parties' agreement not to hold a hearing;
- (b) The date the Administrative Judge receives the transcript of the hearing; or
- (c) The date the Administrative Judge receives post-hearing submissions permitted under § 708.28(b)(7) of this subpart C.

§ 708.31 Procedure for issuing an initial agency decision.

- (a) The Administrative Judge will serve the initial agency decision on all parties.
- (b) An initial agency decision issued by the Administrative Judge will contain appropriate findings, conclusions, an order, and the factual basis for each finding, whether or not a hearing has been held on the complaint. In making such findings, the Administrative Judge may rely upon, but is not bound by, the report of investigation.
- (c) If the Administrative Judge determines that an act of retaliation has occurred, the initial agency decision will include an order for any form of relief permitted under § 708.36. If the Administrative Judge does not determine that an act of retaliation has occurred, the initial agency decision will state that the complaint is denied.

§ 708.32 Appealing an initial agency decision.

(a) By the 15th day after receiving an initial agency decision from the Administrative Judge, any party may file a notice of appeal with the OHA Director requesting review of the initial agency decision.

(b) A party who appeals an initial agency decision (the appellant) must serve a copy of the notice of appeal on all other parties.

(c) A party who receives an initial agency decision has not exhausted its administrative remedies until an appeal has been filed with the OHA Director and a decision granting or denying the appeal has been issued.

§ 708.33 Procedure for appeals.

(a) By the 15th day after filing a notice of appeal under § 708.32, the appellant must file a statement identifying the issues that it wishes the OHA Director to review. A copy of the statement must be served on the other parties, who may file a response by the 20th day after receipt of the statement. Any response must also be served on the other parties.

(b) In considering the appeal, the OHA Director:

(1) Will possess all powers necessary to adjudicate the appeal.

(2) Will review findings of fact for clear error and conclusions of law *de novo*; and

(3) Will close the record on appeal after receiving the last submission permitted under this section.

§ 708.34 Procedure for issuing an appeal decision.

(a) If there is no appeal of an initial agency decision, and the time for filing an appeal has passed, the initial agency decision becomes the final agency decision.

(b) If there is an appeal of an initial agency decision, the OHA Director will issue an appeal decision based on the record of proceedings by the 60th day after the record is closed.

(1) An appeal decision issued by the OHA Director will contain appropriate findings, conclusions, an order, and the factual basis for each finding, whether or not a hearing has been held on the complaint. In making such findings, the OHA Director may rely upon, but is not bound by, the report of investigation and/or the initial agency decision.

(2) If the OHA Director determines that an act of retaliation has occurred, the appeal decision will include an order for any form of relief permitted under § 708.36.

(3) If the OHA Director does not determine that the employer has committed an act of retaliation, the appeal decision will deny the complaint.

(4) If the OHA Director determines that the complaint was properly dismissed, the appeal decision will deny the appeal.

(5) If the OHA Director determines that a complaint should not have been dismissed, the appeal decision will vacate the initial agency decision and order further processing of the complaint.

(c) The OHA Director will send an appeal decision to all parties and to the Head of Field Element or EC Director having jurisdiction over the contract under which the complainant was employed when the alleged retaliation occurred.

(d) The appeal decision issued by the OHA Director—other than an appeal decision ordering further processing of a complaint—is the final agency decision unless a party files a petition for Secretarial review by the 30th day after receiving the appeal decision. A decision by the OHA Director to reverse a dismissal may not be the subject of a petition for Secretarial review.

§ 708.35 Review by the Secretary of Energy of an appeal decision.

(a) By the 30th day after receiving an appeal decision from the OHA Director, any party may file a petition for Secretarial review with the Office of Hearings and Appeals.

(b) By the 15th day after filing a petition for Secretarial review, the petitioner must file a statement identifying the issues that it wishes the Secretary to consider. A copy of the statement must be served on the other parties, who may file a response by the 20th day after receipt of the statement. Any response must also be served on the other parties.

(c) All submissions permitted under this section must be filed with the Office of Hearings and Appeals.

(d) The Secretary (or his designee) will reverse or revise an appeal decision by the OHA Director only under extraordinary circumstances. In the event the Secretary determines that a revision in the appeal decision is appropriate, the Secretary will direct the OHA Director to issue a revised decision which is the final agency action on the complaint. In the event the Secretary determines to reverse an appeal decision dismissing the complaint, the Secretary may, as appropriate, direct the OHA Director to issue a revised decision ordering further processing of the complaint. If no further processing is ordered, the Secretary's decision is the final agency action on the complaint.

§ 708.36 Remedies.

(a) *General remedies.* If the initial or final agency decision determines that an act of retaliation has occurred, it may order:

(1) Reinstatement;

(2) Transfer preference;

(3) Back pay;

(4) Reimbursement of the complainant's reasonable costs and expenses, including attorney and expert-witness fees reasonably incurred to prepare for and participate in proceedings leading to the initial or final agency decision; or

(5) Such other remedies as are deemed necessary to abate the violation and provide the complainant with relief.

(b) *Interim relief.* If an initial agency decision contains a determination that an act of retaliation occurred, the decision may order the employer to provide the complainant with appropriate interim relief (including reinstatement) pending the outcome of any request for review of the decision by the OHA Director. Such interim relief will not include payment of any money.

§ 708.37 Reimbursement of costs and expenses.

If a complaint is denied by a final agency decision, the complainant will not be reimbursed for the costs and expenses incurred in pursuing the complaint.

§ 708.38 Implementation of final agency decision.

(a) The Head of Field Element having jurisdiction over the contract under which the complainant was employed when the alleged retaliation occurred, or EC Director, will implement a final agency decision by forwarding the decision and order to the contractor, or subcontractor, involved.

(b) An employer's failure or refusal to comply with a final agency decision and order under this regulation may result in a contracting officer's decision to disallow certain costs or terminate the contract for default. In the event of a contracting officer's decision to disallow costs or terminate a contract for default, the contractor may file a claim under the disputes procedures of the contract.

§ 708.39 Sections 6 and 7 of the Contract Disputes Act.

A final agency decision and order issued pursuant to this regulation is not considered a claim by the government against a contractor or "a decision by the contracting officer" under sections 6 and 7 of the Contract Disputes Act (41 U.S.C. 605 and 41 U.S.C. 606).

§ 708.40 Notice of program requirements.

Employers who are covered by this part must inform their employees about these regulations by posting notices in conspicuous places at the work site. These notices must include the name, address, telephone number, and website or email address of the DOE office where employees can file complaints under this part.

§ 708.41 Referral to another agency.

Notwithstanding the provisions of this part, the Secretary of Energy retains the right to request that a complaint filed under this part be accepted by another Federal agency for investigation and factual determinations.

§ 708.42 Extension of deadlines.

The Secretary of Energy (or the Secretary's designee) may approve the extension of any deadline established by this part, and the OHA Director may approve the extension of any deadline under § 708.22 through § 708.34 of this subpart (relating to the investigation, hearing, and OHA appeal process). Failure by the DOE to comply with timing requirements does not create a substantive right for any party to overturn a DOE decision on a complaint.

§ 708.43 Affirmative duty not to retaliate.

DOE contractors will not retaliate against any employee because the employee (or any person acting at the request of the employee) has taken an action listed in § 708.5(a) through § 708.5(c).

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